No. 10523

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. S. D. SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
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LIST OF CASES CITED

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BRIEF OF APPELLEE

STATEMENT OF JURISDICTIONAL FACTS

This is an action by the United States of America against the appellant, who, at the time of the commencement of the action, was a resident of the Northern Division of the Western District of Washington.

Jurisdiction is given by virtue of 18 U.S.C.A. 569 and 28 U.S.C.A. 41a.

FACTS

The facts involved in this cause are as follows: The defendant in 1924 was indicted by a Grand Jury of the United States District Court for the Southern District of California. He was tried, convicted and sentenced. The sentence imposed consisted of a penitentiary term of two years and a fine of $10,000. The offense upon which the sentence was based was a conspiracy to violate the Tariff Law of 1922. The term of imprisonment has been served. The fine of $10,000 remains wholly unpaid with the exception of $51.35.

In 1928 the appellant herein moved from the State of California to the City of Seattle where he has resided at all times since.

The action in the District Court was based upon the judgment of the District Court for the Southern District of California. The purpose of the action was to reduce the fine, therein imposed, to judgment in this District for the purpose of collecting the amount thereof from property now owned by appellant within the State of Washington. Appellant in his answer in the District Court admitted the fine and sought to

defend the same on various technical grounds. In his appeal he relies on the following:

1. That the United States is barred from the enforcement of the claim by virtue of the Statute of Limitations, referring particularly to 28 U.S.C.A. 791.

2. That the United States is barred from enforcement of the claim by virtue of the laws of the State of California and the State of Washington.

3. That by the taking of the pauper's oath, all liability ceased.

The District Court overruled all of these contentions and gave judgment in favor of the United States of America in the balance of the amount due on the fine.

JURISDICTION OF THE DISTRICT COURT

The action in this case was instituted by virtue of Revised Statutes 1041, found in 18 U.S.C.A. 569, which reads as follows:

> "In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execu-

tion against the property of the defendant in like manner as judgments in civil cases are enforced. Where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid."

This statute has been construed in a number of cases, the leading authorities being

Hill v. Wampler, 298 U.S. 463;
Grier v. Kennan, 64 Fed. (2d), 605.

In *Hill v. Wampler*, *supra*, the Supreme Court of the United States, at p. 463, said:

"The payment of a fine imposed by a court of the United States in a criminal prosecution may be enforced by execution against property in like manner as in civil cases. * * *. In the discretion of the court the judgment may direct also that the defendant shall be imprisoned until the fine is paid. * * *. If the direction for imprisonment is omitted, the remedy by execution is exclusive. Imprisonment does not follow automatically upon a showing of default in payment. It follows, if at all, because the consequence has been prescribed in the imposition of the sentence. The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function. This being so, it must have expression in the sentence, and the sentence is the judgment * * *."

ARGUMENT

Counsel for appellant relies on 28 U.S.C.A. 791, reading as follows:

> "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued * * *."

Nowhere in this section do we find the words "fine" or "judgment" used. Counsel contends that penalty and fine are synonymous. The answer to his contention is that if Congress had intended to include a fine imposed upon the defendant for the commission of a criminal act, Congress would have said so.

While the two terms "penalty" and "fine" have been used interchangeably, the distinction between the two is aptly shown in two cases decided by the Circuit Court of Appeals for this District.

In the case of *In re Sanborn*, 52 Fed. 583, the defendant raised the issue that a *fine* was a debt—that therefore in view of the objection contained in the constitution of the State of Washington, the court had no power to imprison a person for failure to pay a fine. In overruling his contention, the Court held that:

> "It is clear that a fine imposed for the violation of laws for the punishment of crimes and misdemeanors is not such a debt as is within the scope of the provisions of the constitution abolishing imprisonment for debt, and Section 990 of the Revised Statutes is therefore not applicable to a criminal case."

On the other hand, the Court ruled just the opposite in regard to the penalty provisions of a statute from the same state. In the case of *United States v. Younger*, 92 Fed. 672, the Court held that actions for penalties are civil actions, as a penalty when incurred by the transgression of a statute, becomes immediately a *debt*, and upon an information filed by the United States Attorney charging an offense for which the Statute prescribes a penalty but does not make it a crime, a bench warrant will not be issued for the arrest of the defendant when the Constitution and laws of the State have abolished imprisonment for debt.

A penalty is a debt. To enforce the penalty, an action must be instituted. Under the statute if an action is instituted and the Government prevails, judgment follows, on which execution issues.

A fine, on the other hand, is itself a *judgment.* No suit is necessary. Execution issues immediately to enforce the judgment of the Court.

It is only in cases of this nature that any action is required, that is, for the purpose of enforcing the judgment of a Court in another jurisdiction.

18 U.S.C.A. 569, reads as follows:

> "In all criminal or penal causes in which *judgment* or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. Where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid."

See also *United States v. Luther*, 13 Fed. Supp. 126.

In the case of *Kausch v. Moore*, 268 Fed. 671, the Court said:

> "A penalty is a sum of money, which the law exacts by way of punishment, for the doing of some act, which the law forbids, or for the failure to do some act, which the law requires to be done. It is true, as the definition foreshadows that sometimes the word "penalty" is undoubtedly used as a synonym of the word "fine"; but as used in the Volstead Act it cannot fairly be so construed, because by another provision of the act a fine as such is clearly provided for. Moreover, no authority can be conferred by Congress

upon the Commissioner of Internal Revenue to impose a fine in the strict sense of that word."

The distinction between fine and penalty is well brought out in the case of *Stockwell v. United States*, 20 L.Ed. 493, an action based upon a violation of the Tariff Law, to-wit, the Act of March 3rd, 1923:

> " * * * By referring to the 89th section of that act it will be seen that it directs all penalties, accruing by any breach of the act to be sued for and recovered, with costs of suit, in the name of the United States of America, in any court competent to try the same; and the collector, within whose district a forfeiture shall have incurred, is enjoined to cause suits for the same to be commenced without delay. This manifestly contemplates civil actions, as does the proviso to the same section, which declares that no action or prosecution shall be maintained in any case under the act, unless the same shall have been commenced within three years after the penalty or forfeiture was incurred. Accordingly, it has frequently been ruled that debt will lie at the suit of the United States, to recover the penalties and forfeitures imposed by statutes * * *."

The fine in this case constitutes a judgment of the Court. When the United States has recovered a judgment against a defendant, its right to revival of the judgment is not affected by any general statute of limitations.

United States v. Houston, 48 Fed. 207;

Godkin v. Chon, 80 Fed. 458;

United States v. Des Moines Val. R. Co., 70 Fed.

435; affirmed 84 Fed. 40;

United States v. Stinson, 197 U. S. 200, 49 L.Ed. 734.

That the imposition of a fine is a judgment is established by Rule 1, Rules of Criminal Procedure, Title 18, U.S.C.A., at p. 149:

> "After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, and except as provided in Sections 724, 725, 726 and 727 of this title sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment or for a new trial, is pending, or the trial court is of opinion that there is reasonable ground for such a motion; or (2) the condition or character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed. The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk.
>
> "Pending sentence, the court may commit the defendant or continue or increase the amount of bail."

The Statutes of Limitations, as far as the Government is concerned, are to be strictly construed. In the case of *United States v. Nashville, et al*, 118 U.S. 126, 30 L.Ed. 81, the Court said:

> "It is settled beyond doubt or controversy—upon the foundation of the great principle of

public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in it as a sovereign government, is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it should be so bound."

See also *United States v. Noojin*, 155 Fed. 379:

"This general principle is amply sustained by the multitude of authorities, both state and federal, cited in the note to the text. * * *. The effort is here made to prevent the United States from enforcing a judgment, secured in its own courts, for the sole benefit of the government. Every penny of the judgment, when collected, will become *eo instanti* the property of the United States. The negligence of the agencies of the government in failing to enforce the judgment and execution cannot be of avail to this movant here. The government is seeking the enforcement of its own rights, and is not, therefore, bound by any statute of limitations, nor barred by any laches of its officers however gross * * *.

" * * * The general rule that laches is not imputable to the government is essential to the preservation of the interests and prosperity of the public. This rule is founded upon the highest grounds of public policy, and any other doctrine would be ruinous in the extreme. All the property of the United States is held in trust for the people, and it is now well settled, upon grounds of public policy, that the public interests shall not to be prejudiced by the neglect of the officers or agents to whose care they are confided * * *. The Supreme Court of the United States has uniformly and repeatedly declared that in such cases

as this laches cannot be set up against the government."

The laws of the State of California and the laws of the State of Washington have no application as far as limitations are concerned when the judgment as rendered was in favor of the United States.

Chesapeake & Delaware Canal Company v. United States, 250 U.S. 123;

United States v. Thomas, et al, 107 Fed. (2d) 765;

Schodde v. United States, 69 Fed. (2d) 866;

Custer v. McCutcheon, 283 U.S. 514.

In the case of *Board of County Commissioners of the County of Jackson, Kansas v. United States*, 308 U.S. 351, the Court said:

"Again, state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise * * *. This is so because the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments."

In the case of *Schodde v. United States, supra*, Ninth Circuit case, the Court said:

"Further, this suit is predicated upon a judgment which runs in favor of the United States. The law is well established that the government is not bound by a state statute of limitations in

the absence of a clear manifestation of such intention * * *."

The case of *Custer v. McCutcheon, supra,* at p. 515, is extremely interesting as applied to the present case. This case went to the Supreme Court of the United States on certiorari from the Circuit Court of Appeals for the Ninth Circuit.

In that case the United States Marshal levied an execution issued September 21, 1929, out of the District Court of Idaho, against the petitioner upon a judgment entered in that Court March 7, 1921, in favor of the United States. Petitioner filed a bill in the same Court to restrain the Marshal from proceeding further under the execution process, on the ground that p. 6910 of the Idaho Compiled Statutes of 1919 permitted the issuance of execution only within five years from the date of the rendition of the judgment.

The Court, on p. 519, spoke as follows:

"It is clear, therefore, that R. S. p. 916 and rules of court adopted pursuant thereto confine the United States to such executions as may be issued by individuals under the state statutes, and impose upon it the same restrictions and exemptions as are applicable to other suitors, and the question here is whether an exception should be made to this general rule as respects the time fixed by the state statute within which execu-

> tion must issue. We see no valid reason for making such an exception. The time limited for issuing executions is, strictly speaking, not a statute of limitations. On the contrary, the privilege of issuing an execution is merely to be exercised within a specified time, as are other procedural steps in the course of a litigation after it is instituted. The plaintiff is not precluded from bringing an action upon the judgment, but merely from having an execution in the form provided by state law."

Following this case, an action was instituted on June 15, 1931, over ten years after the original judgment, by the United States against Schodde, et al. The complaint pleaded the judgment and that it had not been reversed, set aside, modified or paid.

In its memorandum opinion the Court pointed out that the Supreme Court in the case of *Custer v. McCutcheon, supra,* held that the plaintiff here was not precluded from bringing an action upon the judgment, but merely from having execution in the form provided by state law. The Court said at p. 870:

> "This suit is predicated upon a judgment which runs in favor of the United States. The law is well established that the government is not bound by a state statute of limitations in the absence of a clear manifestation of such intention."

Schodde v. United States, 69 Fed. (2d) 866.

Counsel for appellant in his brief has raised a question in regard to the statutes of the State of Cali-

fornia and the statutes of the State of Washington relating to the lien of the judgment and the execution issuing upon judgments. Liens, executions and supplementary proceedings are all matters of procedure. On matters of procedure our courts have ruled that State limitations apply to the United States just as to an individual. The same courts have uniformly ruled that the Statute of Limitations do not apply to the cause of action itself. For example, in the present instance, the United States of America could not obtain an execution based upon the judgment as heretofore rendered in the State of California without bringing an independent action for the revival of the judgment. This is due to the fact that the State has a right to pass laws relative to procedural matters. But as pointed out in the *Custer* case and in the *Schodde* case, the fact that the Court cannot issue execution does not preclude the Government from bringing an action to recover the amount of the debt as determined by the judgment heretofore rendered. The two cases—the *Schodde* case and the *Custer* case—one by the Supreme Court of the United States and the other by the Circuit Court for this District, are conclusive as far as the questions involved in this case are concerned.

Relative to the third question raised, namely, that by taking the pauper's oath, the defendant was released from all liability as far as the execution from all civil liability, as well as imprisonment, the case of *United States v. Pratt*, 23 Fed. (2d) 333, is conclusive in this matter.

Respectfully submitted,

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